United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

74-1436

United States Court of Appeals
For the Second Circuit

SECURITIES & EXCHANGE COMMISSION,
Plaintiff-Appellee.

-against-

SAMUEL H. SLOAN & CO.,
SAMUEL H. SLOAN,
Defendants-Appellants.

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P/S

PETITION FOR REHEARING AND SUGGESTION THAT THE REHEARING BE IN BANC

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AUTHORITIES CITED

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals have jurisdiction to dismiss sua sponte this appeal where no motion to dismiss or suggestion that this appeal be dismissed was filed, where an appeal may be had as a matter of right and where neither statute nor court rule provides for the dismissal of an appeal under the circumstances present here?

2. Does the dismissal of this appeal and the refusal to reinstate this appeal deprive the appellants of their constitutional rights including the right of notice, the right to a hearing and the opportunity to take corrective action?

STATEMENT OF THE CASE

The complaint in this action was filed on June 17, 1971.

After a five day trial before the Hon. Robert J. Ward in December, 1973, the Securities & Exchange Commission ("S.E.C.") requested and obtained an injunction enjoining violations of SEC Rule 15c3-1, 17 CFR 240.15c3-1, the "net capital rule", and SEC Rules 17a-3 and 17a-4, 17 CFR 240.17a-3, 17 CFR 240.17a-4, the "bookkeeping rules." SEC v. Samuel H. Sloan 369 F. Supp. 996 (1974). Appeals were taken from this injunction and also from various post-trial orders.

Subsequently, this appeal was perfected. A brief was filed by Samuel H. Sloan ("Sloan") in behalf of the appellants and by the SEC. No suggestion was made either in the form of a motion or in the brief filed by the SEC that this appeal should be dismissed. Oral argument was scheduled for January 7, 1976. However, prior to the argument date, both sides advised the court that they wished to submit and neither were present for oral argument.

On January 7, 1976 the appeal was dismissed sua sponte by this court. The one sentence summary order stated, in part:

> " . . . the appeal . . . is dismissed. See United States v. Sperling 506 F. 2d 1323, 1345 n. 33 (2d Cir. 1974) cert. denied 420 U.S. 962 (1975) and authorities there cited."

On the same day, January 7, 1976, two other appeals of appellant Sloan were dismissed. SEC v. Canadian Javelin Ltd. No. 75-7046 (2d Cir. January 7, 1976) and SEC v. Samuel H. Sloan No. 75-7056 (2d Cir. January 7, 1976). However, on February 2, 1976 Sloan was permitted to appear and argue

yet a fourth appeal in this court, Sloan v. Canadian Javelin Ltd. No. 75-7096. That appeal was not dismissed but instead was decided on the merits on February 6, 1976.

On February 6, 1976 Sloan moved the Court of Appeals for an order reinstating all three of the appeals which had been dismissed. No opposition to this motion was filed by the SEC. Although Sloan stated in his moving papers that he wished to have oral argument on this motion, no oral argument was scheduled. On March 15, 1976 a three judge panel of this court, Timbers, Van Graafeiland and Meskill, CCJ, summarily denied this motion in all respects. No statement of reason for the denial of this motion was given in this decision. The appellant now petitions for a rehearing and further suggests that the rehearing be in banc.

ARGUMENT

The fact that this court is in error in its decision to dismiss sua sponte these three appeals and to refuse to reinstate these appeals is so obvious that a detailed discussion of this point is foreclosed. However, there seems to be an underlying explanation for the otherwise irrational determination of this appeal. That explanation is that this court does not personally like Samuel H. Sloan and therefore does not want to hear and consider his appeals. Perhaps this dislike for Sloan is based

upon a case long since disposed of: Sloan v. Nixon 60 F.R.D. 228 (SDNY 1973) aff'd 493 F.2d 1398 (2d Cir. 1974) aff'd 419 U.S. 958 (1974) rehearing denied 419 U.S. 1097 (1974). Whatever the reason, this court gave no explanation for dismissing these appeals or for refusing to reinstate these appeals and a recent decision by this court, Sloan v. SEC slip op. 2377 (2d Cir. March 4, 1976) makes it clear that Sloan appeals are not welcome in the United States Court of Appeals for the Second Circuit.

It is a violation of the U.S. Code for a federal judge to fail to decide a case "without respect to persons", 28 U.S.C. 453. However, that is not the only provision of the U.S. Code which has been violated here. In this case, Sloan has an appeal as a matter of statutory right and consequently the dismissal of this appeal was illegal. If the judges of this court want to commit an illegal act they should rob a bank and not make life difficult for Sloan.

Moreover, there are constitutional considerations involved. Article III of the Constitution provides that the inferior courts shall function under such regulations as Congress shall establish. Clearly, this court has failed to do so here. In addition, the Fifth Amendment requires that Sloan be awarded due process of law which means notice and the opportunity for a hearing. In this case, the court of appeals took its action sua sponte and consequently

there was no notice. Nor was Sloan given the opportunity for a hearing because when he moved for reinstatement of these appeals, no oral argument was scheduled. In addition, Sloan was not given the opportunity to take corrective action if any was needed. Sloan appeared in this court almost immediately after he learned of the decisions of January 7, 1976. However, there is nothing that Sloan could have done, other than what he did do, to cause this appeal to be reinstated.

No reason was given by this court for the dismissal of these appeals and it is obvious that there is and can be no reason other than personal prejudice against Samuel H. Sloan. The single case cited in the decision of this court, United States v. Sperling 506 F. 2d 1323, 1345 n. 33 (2d Cir. 1974), is inapposite if not irrelevant. There, one defendant Garcia was given thirty days to surrender if he wanted to have his appeal decided. Otherwise his appeal would be dismissed. All of the "authorities there cited" in that decision contained similar provisions. No such condition has been attached to the dismissal of the appeal in this case. Moreover, Sloan did in fact appear in court within thirty days of the order to dismiss. These appeals and therefore, if United States v. Sperling can be said to control, Sloan is entitled to have these appeals reinstated.

However, United States v. Sperling is wholly irrelevant. In Estelle v. Dorrough, 420 U.S. 534 (1975)

the Supreme Court made it clear that the dismissal of an appeal constitutes a punishment for the crime of escape. This is a civil and not a criminal case. Sloan has committed no crime or, at least, he has never been formally accused of committing a crime in any federal court. The Sixth Amendment bars him from being punished as a criminal until at least he has been formally arrested and indicted. In any event, assuming arguendo that Sloan were a criminal defendant in another unrelated case, that case would have no bearing on the civil litigation here.

In this case, this court has attempted to conceal its irresponsible and illegal conduct by failing and refusing to write an opinion or even a brief per curiam explanation for its decision. Again, the single criminal case cited is clearly not analogeous to this civil case. In a decision which merits careful study considering the issues involved in this appeal, Maness v. Meyers 419 U.S. 449 n. 15 (1975), the Supreme Court stated:

> "Reliance to us seems misplaced .... comments in a criminal case as to the law in a civil case hardly reach the level of constitutional doctrine, if indeed they are any more than dicta."

Clearly, if this court is going to apply the "dicta" found in the criminal case of United States v. Sperling to this civil case, it must at least explain its decision if for no other reason than to guide future litigants, assuming that this court intends to apply to future litigants the principle, if there is any principle, which

it has applied here to Sloan.

It is appropriate to say a few words about the merits of this appeal itself. In a proceeding before Judge Ward on February 2, 1976 in SEC v. Sloan 74 Civil 5729 the following colloquy took place (Transcript p. 42-43):

> MR. SLOAN: Your Honor, I object most strenuously. Mr. Pernick has not testified under oath. We have been through this many, many times where a representative of the Securities and Exchange Commission has said something and you take it as a matter of evidentiary fact. I went through a five day trial with you in 1973 where the Commission repeatedly stood up and made statements not under oath which are not supported by any evidence. You copied their brief in your decision. I noticed in the brief that the SEC filed with the Court of Appeals they didn't even defend your findings of fact and, in fact, your findings of fact could not be defended because there was no evidence in the evidence about any findings and you are about to do the same thing."

This statement sums up one of the principal issues involved in this appeal. Appellant Sloan contends that there is "no evidence in the evidence about any findings" or, to put it more articulately, that not a single one of Judge Ward's 31 findings of fact and 11 sub-paragraphs are supported by evidence and hence all are "clearly erroneous" and must be set aside in accordance with Fed. R. Civ. P. 52(a).

If this claim is correct, this appeal should be fairly simple to decide even though the record includes an 853 page trial transcript and one hundred exhibits.

It is noteworthy that the SEC did not see fit to have any of this material included in the appendix. However, this court has expressly decided not to decide this appeal which seems to be the only way the SEC could hope to win in view of the fact that the brief of the SEC in this appeal does not expressly defend any of Judge Ward's findings of fact.

For all of these reasons, it is submitted that this appeal should be reinstated and decided on the merits. Recently, this court scheduled another Sloan appeal, SEC v. Sloan 75-6106, an appeal from an order of civil contempt, for argument on Tuesday April 27, 1976. It is suggested that this court set the argument of the instant appeal for the same date especially since this court apparently believes these appeals to be somehow related.

It is further suggested that the rehearing of this appeal be in banc. In banc procedure is generally reserved for cases involving issues which are likely to affect many other cases. See Appeals to the Second Circuit prepared by the Committee on Federal Courts, The Association of the Bar of the City of New York (1975) p. 48. There are eight Sloan appeals which are presently pending or which until recently have been pending. All seem to be intertwined. Since every active judge of this court, with two exceptions, is or has been involved in one or another of these appeals, and since decisions and orders entered in

all but one of these appeals seems to be related to the decision, or lack of decision, in the instant case, no extraordinary expenditure judicial time will be created by having all of the active judges of this court decide the fundamental question of whether Sloan should be permitted to appeal.

One further point should not be neglected. By dismissing these appeals this court is injuring Sloan, and at the same time, is doing nothing which benefits the SEC. Since the SEC did not oppose Sloan's motion to reinstate, it is fair to conclude that the SEC wants to have the five years it spent litigating this case vindicated by a decision from this court on the merits rather than a cheap victory which aids noone and will inevitably lead to the SEC being put to the expense of responding to a petition for a writ of certiorari. Of course, Sloan would not purport to advocate the position of the SEC in this appeal, but since the judges of this court are apparently unconcerned about how much harm and injury results to Sloan because of its actions, perhaps it might at least give consideration to the SEC's position in this case. Again, it is worth observing that in United States v. Sperling the Government filed a motion to dismiss the appeal whereas no such motion was filed in this case.

CONCLUSION

For all of the reasons set forth above, this petition for a rehearing should be granted and the suggestion that the rehearing be in banc should be adopted.

Respectfully submitted,

Samuel H Sloan

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Dated: March 28, 1976

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the ____ day of March 197 6 deponent served the within Petition upon:

Michael J. Steward, Esq.
Securities & Exchange Commission

attorney(s) for

Appellee

in this action, at

500 N. Capitol St.
Washington, D.C. 20549

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 29
day of March, 197 6.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977